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February 27, 2003

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
TW-B204
Washington, DC 20554

Re: *WC Docket No. 03-11: Application of Qwest Communications International, Inc. to Provide In-Region, InterLATA Services in the States of New Mexico, Oregon and South Dakota*

Dear Ms. Dortch:

Pursuant to the Commission's January 15, 2003 Public Notice in the above-referenced proceeding, DA 03-125, Touch America, Inc. ("Touch America") hereby files its reply to the comments filed in response to the Consolidated Application of Qwest Communications International Inc. ("Qwest") for authority to provide in-region, interLATA services in the States of New Mexico, Oregon and South Dakota.[1] In its initial comments, Touch America demonstrated that Qwest's designation of Qwest Communications Corporation ("QCC") and Qwest Long Distance Corp. ("QLDC") is inappropriate in light of the on-going accounting investigations and, with respect to QCC, also violates the Commission's "complete-as-filed" rule. Touch America also showed the inexcusably low level of competition that exists in the states, which undermines Qwest's representations regarding its ability to satisfy CLEC demand, and reaffirmed that Qwest's premature offering of in-region interLATA services, as well as the secret agreements it entered into with select competitors, makes Qwest's Application fail on public interest grounds.

Similarly, the initial comments in this proceeding make clear that Qwest has not met its statutory obligations and that approval of the Application is not in the public interest. For

[1] *See In the Matter of Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11 (filed Jan. 15, 2003)("Application").

instance, not only has Qwest failed to demonstrate that even the most minimal residential competition exists in the State of New Mexico, but Qwest continues to thumb its nose at its statutory and regulatory obligations while disclosing additional accounting problems that undermine its representations of statutory compliance. Its Application must be denied.

A. Qwest's ongoing financial disclosures undermine Qwest's compliance with Section 272.

In its Application, Qwest includes both QCC and QLDC as possible candidates for its 272 affiliate and represents that such entities will comply with Section 272. In its initial comments, as well as in its comments in Qwest's prior 271 proceeding,[2] Touch America demonstrated that Qwest's Application fails to support the approval of QCC as Qwest's 272 affiliate insofar as Qwest cannot represent that QCC's financial records are maintained in accordance with Generally Accepted Accounted Principles ("GAAP") as required by statute and the Commission's Rules.[3] Moreover, Touch America showed that because Qwest continues to investigate and review – with an eye towards fixing – the problems inherent in its internal accounting processes and controls, it is incredulous to claim that such problems will not affect QLDC, as well as QCC.

Since the filing of the initial comments in this proceeding, Qwest has disclosed additional accounting adjustments, including adjustments to adjustments, and indicated that Qwest's financial statements are still under review, further demonstrating that Qwest's representations regarding 272 compliance are wishful, at best. Specifically, on February 11, 2003, Qwest announced "additional results of its internal review of the 2001 and 2000 financial statements" and disclosed additional restatements in the amount of $357 million.[4] In doing so, however, Qwest stated that it "can give no assurances that such aggregate adjustments are final and that all adjustments necessary to present its financial statements in accordance with GAAP have been identified."[5]

Particularly given that QCC's transactions have already resulted in millions of dollars of financial restatements and caused Qwest to retract its first 271 Application, Qwest must be able to affirmatively demonstrate that its 272 affiliate complies with GAAP and that the transactions between the 272 affiliate and the Bell Operating Company comply with GAAP as required by statute.[6] Qwest's continued financial restatements and hedging as to whether additional restatements are forthcoming fail to provide such assurances. Indeed, at this point, Qwest is making adjustments to its previous adjustments, clearly calling into question what further restatements and revisions are on the horizon. Moreover, the ongoing review of its accounting

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2 *See, e.g.*, WC Docket No. 02-314, Comments of Touch America, Inc. at 7-9 (filed Oct. 15, 2002).

3 47 U.S.C. § 272(b)(2); *In the Matter of Implementation of the Telecommunications Act of 1996, Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, 11 FCC Rcd. 17539, 17618, ¶ 170 (1996).

4 *See* "Qwest Communications Announces Additional Results of Internal Review of 2001 and 2000 Financials" (released Feb. 11, 2003).

5 *Id*. at 4.

6 47 U.S.C. § 272(c)(2).

policies and controls wholly undermine Qwest's representations as to the compliance of QLDC and QCC with Section 272. This is true despite the fact that QLDC is a newly-formed entity. The Commission is therefore not in a position at this time to ascertain whether or not QCC or QLDC meets the statutory requirements and, as such, Qwest's designation of QCC or QLDC as its 272 affiliate must be rejected. Qwest must be required to clean up its books once and for all before the Commission approves its 271 Application.

B. The total absence of any residential competition in New Mexico dooms Qwest's Application.

The initial comments demonstrate that Qwest's attempt to meet the Track A market requirements for residential services in New Mexico through resale or broadband PCS competition is not only contrary to the clear language of the statute and the underlying Congressional intent, but is also not supported by the facts. Because the New Mexico Public Regulation Commission ("New Mexico PRC") concluded "there is no wireline facilities-based residential service by competing carriers in New Mexico,"[7] Qwest attempts to rely exclusively on the existence of non-facilities-based resale competition or PCS service as a substitute for wireline local exchange service. Not only is Qwest wrong on the law, but its position is not even borne out by the facts. As demonstrated in the initial comments in this proceeding, no "actual commercial alternative" to Qwest exists in the residential New Mexico market and, as such, its Application must be rejected for failure to meet the requirements of Section 271(c)(A).

Qwest elected to support its Application through evidence of meeting the "Track A" requirements, set forth in Section 271(c)(A). Section 271(c)(A) requires "competing providers of telephone exchange service . . . to residential and business subscribers"[8] and that such telephone exchange service is offered by the competing providers "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[9] The language of the statute could not be clearer: the competing provider must provide service over its own facilities or through combination of its own facilities and resold services. In other words, non-facilities-based resale alone is not sufficient to satisfy Track A.[10] Indeed, as

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[7] *See In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process, Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A, and Public Interest*, Utility Case No. 3269 *et al*., ¶126 (NMPRC Oct. 8, 2002) ("*NMPRC Final 271 Order")*. *See also* WC Docket No. 03-11, Evaluation of the United States Department of Justice at 9 (filed Feb. 20, 2003) ("DoJ Evaluation")("[i]n New Mexico, there appears to be little, if any, competition for residential subscribers using CLECs' own facilities or unbundled elements obtained from Qwest").

[8] As such, pursuant to the clear language of the statute, a showing of competition in the business market alone is insufficient.

[9] 47 U.S.C. §271(c)(A).

[10] Touch America recognizes that the Commission has implied in prior 271 proceedings that, if all other requirements of Section 271 have been satisfied, it does "not appear to be consistent with congressional intent to exclude a BOC from the in-region interLATA market solely because the competitors' service to residential customers is wholly through resale*." See*

shown by AT&T, Congress expressly intended to exclude non-facilities-based resale services when it stated that "telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service . . . does not suffice to meet the [Track A] requirement."[11] Given the clear language of the statute, as well as the supporting Congressional intent, Qwest's reliance on competitive residential resale providers to meet the Track A requirements in New Mexico fails.[12]

Moreover, the Commission has held that a 271 applicant must show "that at least one 'competing provider' constitutes an actual commercial alternative to the BOC, which a BOC can do by demonstrating that the provider serves 'more than a *de minimis* number' of subscribers."[13] As AT&T and WorldCom demonstrate, and as the New Mexico Commission concluded, the residential resale carriers that Qwest relies upon are not "providing consumers with an actual competitive alternative."[14] Instead, Qwest relies predominantly on a resale carrier that serves customers who were formerly disconnected from Qwest's service for failure to pay.[15] As such, the resale carrier is not competing with Qwest and does not therefore provide "an actual competitive alternative" to Qwest. The New Mexico PRC agreed by finding that "the resellers cited by Qwest almost universally serve a niche market composed primarily of 'high risk' customers who have been disconnected by Qwest for failure to make payments"[16] and, consequently, that the evidence "in its Track A proceedings revealed that the resellers in New Mexico are neither competing with Qwest for the same customers nor providing New Mexicans with an 'actual commercial alternative'".[17] Thus, even if resale residential competition alone is

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Application of BellSouth Corporation for Provision of In-Region, InterLATA Services in Louisiana, Memorandum Opinion and Order, 13 FCC Rcd. 20599, 20635, ¶48 (1988); *Joint Application of SBC Communications, Inc. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd. 6237, 6258, ¶43, n. 101 (2001). These statements, however, are conclusory and without explanation. Therefore, such a finding would be wholly contrary to the clear language of the statute.

11 *See* WC Docket No. 03-11, Comments of AT&T Corp. at 12-13 (filed Feb. 5, 2003)("AT&T Comments")(*citing* House Conf. Rep. No. 104-458, at 147-48, reprinted in 1996 U.S.C.C.A.N. 10,160).

12 *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)(an agency "must give effect to the unambiguously expressed intent of Congress"); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (an agency has "no authority to ascribe a construction to a statute that is 'plainly contrary to the intent of Congress'").

13 *See In the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, FCC 02-332, ¶ 20 (rel. Dec. 23, 2002) ("*Qwest 9-State 271 Order*").

14 *See* AT&T Comments 14-15; WC Docket No. 03-11, Comments of WorldCom, Inc. at 2-4 (filed Feb. 5, 2003) ("WorldCom Comments").

15 *See* WorldCom Comments at 2-4; AT&T Comments at 14-15.

16 *See* WC Docket No. 03-11, Comments of the New Mexico Public Regulation Commission at 21 (filed Feb. 5, 2003) ("New Mexico PRC Comments").

17 *Id*. at 22-23. *See also id*. at 29.

sufficient to meet Track A, Qwest has failed to demonstrate that more than a *de minimis* level of residential competition exists or that the resale carriers are providing consumers with an actual competitive alternative to Qwest.

Presumably in recognition of its tenuous position – that resale by one or two carriers that are not competing with Qwest alone satisfies the requirements of Track A – Qwest also claims that the existence of one PCS provider is sufficient to satisfy Track A. In support of its position, Qwest undertook a "study" intended to demonstrate that the customers of Cricket Communications in New Mexico use their Cricket PCS service as a replacement for their wireline residential phone. However, as the New Mexico PRC found, Qwest's Cricket survey is wholly unpersuasive and therefore cannot be relied upon by Qwest to support its Application.[18]

For example, the New Mexico PRC found fault with the phrasing of the questions and questioned whether the respondents properly understood them in view of the inconsistencies in their responses.[19] Moreover, the New Mexico PRC found that the evidence proffered by Qwest "is, at best, anecdotal and thus not persuasive for purposes of showing a substantial number of Cricket customers in New Mexico are using broadband PCS to replace wireline service."[20] The New Mexico PRC ultimately concluded that "there is no single exhibit, strand of testimony or other piece of evidence that proves with any degree of reasonable certainty – let alone evidence sufficient to fulfill the substantial evidence standard that Commission orders must satisfy – that Qwest has met its burden of showing there is an actual and significant number of Cricket subscribers in Qwest's New Mexico territory who have substituted broadband PCS service for Qwest wireline service."[21] Qwest has provided no evidence to contradict the New Mexico PRC's findings.

Despite the fact that the New Mexico PRC concluded that the resale carriers cited by Qwest are not providing consumers with an actual competitive alternative and also found significant problems in Qwest's Cricket "study," "[g]iven the significant issues of first impression presented coupled with the NMPRC's consultative role," the New Mexico PRC ultimately decided to present its findings without rendering a dispositive recommendation regarding compliance with Track A.[22] The Department of Justice likewise deferred the matter to the Commission.[23] Given the clear language of the statute, however, the New Mexico PRC and the Department of Justice are mistaken and should have rendered decisions on this failing by Qwest. Stated differently, the issue is less novel than the statute is clear and these agencies should have been able to find, based on the language of the statute alone, that Qwest has failed to meet the Track A requirements.

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18 The New Mexico PRC, with all the facts before it, "found significant problems inherent in the design, methodology, and implementation of the Cricket survey." *See NMPRC Final 271 Order*, ¶154.

19 *Id.,* ¶¶149-151. *See also* WorldCom Comments at 5-7; AT&T Comments at 17-22.

20 *See* New Mexico PRC Comments at 23.

21 *Id*. at 29.

22 *See* New Mexico PRC Comments at 29-30.

23 *See* DoJ Evaluation at 10.

The Commission must not lightly consider the Track A requirements. Track A constitutes the threshold requirement by which a Bell Operating Company must demonstrate that competition exists in its region. This clearly goes to the very heart of Section 271. Accordingly, in making its Track A determination, the Commission must seriously consider and weigh the evidence set forth by the New Mexico PRC. Such a considered review demonstrates that Qwest has failed.

C. The Comments make clear that approval of the Application is not in the public interest.

Qwest has failed to demonstrate that approval of its Application is in the public interest. Qwest continues to make empty promises and to do as it wishes, not as it should and must. For instance, Qwest refuses to comply with the directives of the South Dakota Public Utilities Commission ("South Dakota PUC") related to Qwest's performance assurance plan ("QPAP"). During its 271 proceeding, the South Dakota PUC identified certain elements of the QPAP that it found were not in the public interest and directed Qwest to modify the QPAP in accordance with the South Dakota PUC's rulings.[24] Qwest refused to do so. As a result, in this proceeding, the South Dakota PUC is unable "to recommend to the FCC that the granting of section 271 approval to Qwest in South Dakota is in the public interest."[25] For instance, the South Dakota PUC is concerned that a cap on liability – which the South Dakota PUC directed Qwest to delete from the QPAP, but Qwest refused – may reduce the QPAP's effectiveness in South Dakota and fail to provide a sufficient incentive for Qwest to provide satisfactory service to CLECs.[26] The South Dakota PUC also found contrary to the public interest Qwest's refusal to include language that would permit the South Dakota PUC to modify the QPAP, finding that "[a]llowing the Commission to review Qwest's performance without having the express ability within the QPAP to actually require changes would be a meaningless exercise."[27] The South Dakota PUC's position on the QPAP is intended to protect the rights of competitors. Accordingly, as the South Dakota PUC withheld approval of the Application for Qwest's failure to comply with its directives, so should this Commission.

Further, as demonstrated by AT&T, Qwest has failed to comply with its representations to the Commission related to the filing of the secret agreements. In approving Qwest's prior 271 Application, the Commission found that "concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of the agreements to the commissions of the applicable states pursuant to section 252 and by each state acting on Qwest's submission of those agreements."[28] Although Touch America contends that the Commission's decision fails to account for the past discrimination and damage to the 271 record caused by Qwest entering into the secret agreements, Qwest cannot meet the Commission's standard for approval in this instance. The New Mexico PRC found that Qwest knowingly and intentionally

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24 *See* WC Docket No. 03-11, Comments of the Public Utilities Commission of South Dakota, at 8-16 (filed Feb. 4, 2003) ("South Dakota PUC Comments"). *See also* AT&T Comments at 39-42.

25 South Dakota PUC Comments at 16.

26 *Id.* at 10.

27 *Id*. at 13-14.

28 *Qwest 9-State 271 Order,* ¶ 486.

engaged in discriminatory behavior by entering into the secret agreements and further found that there may be "additional agreements that should be filed with the Commission for approval pursuant to the Act."[29] That is, based on its investigation, the New Mexico PRC believes that there may be additional agreements lurking about that Qwest has failed to disclose, thereby wholly undercutting the Commission's basis for approving the Application despite the existence of the secret agreements.

In sum, Qwest's failure to meet the Track A requirements in New Mexico alone mandates denial of the Application. Moreover, in light of Qwest's on-going financial investigations, reviews, restatements and adjustments to adjustments, Qwest is unable to demonstrate compliance with Section 272. Qwest must be made to comply with all of the requirements of the Act and its obligations to competitors, not just those with which it chooses to comply. Qwest's continued refusal to do so makes approval of its Application impossible as a matter of law.

For these reasons, Touch America respectfully requests that the Commission deny Qwest's Application to provide in-region, interLATA services in the States of New Mexico, Oregon and South Dakota.

Respectfully submitted,

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/s/

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[29] *NMPRC Final 271 Order,* ¶¶ 295-97. *See also* AT&T Comments at 31-35.